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No. 82-168.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Transportation Management Corp.

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Question Presented.

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

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Opinions Below.

The opinion of the Court of Appeals (Pet. App. 1a-8a)[1] is reported at 674 F.2d 130. The decision and order of the National Labor Relations Board (Pet. App. 10a-16a) and the decision of the Administrative Law Judge (Pet. App. 17a-45a) are reported at 256 N.L.R.B. 101.

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari; "J.A." refers to the joint appendix prepared pursuant to Rule 30; "Pet. Brief" refers to the brief of the Petitioner.

Jurisdiction.

The judgment of the Court of Appeals (Pet. App. 9a) was entered on April 1, 1982. The petition was filed on July 30, 1982 and was granted on November 15, 1982 (J.A. 130). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides in pertinent part:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

> affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

Statement of the Case.

Respondent hereby respectfully concurs with the Petitioner's Statement of the Case (Pet. Brief 3-7) with the following modifications, each of which is based upon testimony before the Administrative Law Judge (J.A. 9-106):

1. Patterson, an agent of the Respondent, received complaints in February of 1979 that Santillo was taking unauthorized breaks (J.A. 36-37) and impermissibly parking his equipment at his residence (J.A. 53-54). Respondent consequently installed a working tacograph in Santillo's school bus on March 12, 1979 (J.A. 55). The information recorded by the tacograph allowed the Respondent to determine the time Santillo's bus was in use (J.S. 79-83); and was relied upon in computing his compensatory time (J.A. 55-57). At the conclusion of the working day on March 23, 1979, Patterson read the tacograph for the week of March 19 (J.A. 66, 107, 108) and concluded that Santillo had been compensated for time not worked (J.A. 59, 68, 69).

2. Patterson also found that Santillo had consistently left keys in his bus in contravention of company warnings to the contrary (J.A. 50-52).

Following these events, Santillo was discharged for the above infractions (Pet. App. 24a, J.A. 70).

Summary of Argument.

A. Section 8(a)(3) of the National Labor Relations Act (Act) does not impose an affirmative burden of persuasion upon an employer to prove that a discharge would have occurred in the absence of protected activity. To determine whether a violation of section 8(a)(3) has transpired, the Board must arrive at the "true purpose" for the discharge by weighing the interests of the employee against lawful management objectives of the employer. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 46 (1937). To arrive at the "true purpose" for the discharge, the First Circuit Court of Appeals fashioned a three-part causation standard consistent with the Act and decisions of this Court. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). That standard provides that General Counsel as the charging party establish a *prima facie* case of discrimination by showing that protected activity was a motivating factor in the discharge. A burden of production then devolves upon the employer to provide evidence that a legitimate reason existed for the discharge. The burden of proof then rests with the General Counsel to persuasively prove by a preponderance of the evidence that, despite the alleged reason of the employer, a discharge would not have occurred in the absence of union activities. The Court of Appeals' burden of proof standard fully effectuates the policies and purposes of the Act to protect employees suffering adverse employment consequences due to union activity. At the same time, the causation standard recognizes the lawful management rights of employers to discharge employees for cause.

1. The standard of proof set forth by the Court of Appeals is not substantially different from the burden of proof standard

established by this Court for employment discrimination claims under Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000*e*, *et seq.*; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *Burdine* proof standard prohibits the imposition of a burden of persuasion on an employer in a Title VII action and provides a reasonable guide for allocating burdens of proof between General Counsel and employer under the Act.

2. The legislative history of the Act supports the Court of Appeals decision that the burden of persuasion remains with the General Counsel for the pendency of a Section 8(a)(3) action. Although the legislative history is silent on the precise allocation of burdens of proof between General Counsel and the employer, Rule 301 of the Federal Rules of Evidence is directly applicable to Board proceedings under Section 10(b) of the Act. In accordance with traditional evidentiary principles, Rule 301 explicitly provides that the party against whom a presumption is imposed merely has the burden of producing evidence to rebut that presumption. The Court of Appeals' burden of proof formulation, therefore, is consistent with Congressional intent that the rules of evidence as applied in the federal district courts apply to all Board proceedings.

Argument.

Under Section 8(a)(3) of the National Labor Relations Act, Once General Counsel Has Made an Initial Showing that Protected Conduct Was a Motivating Factor in the Discharge, the Employer Only Has the Burden of Producing Evidence that the Employee Was Discharged for Cause, After which the General Counsel Carries the Burden of Persuasion in Proving that the Employer Would Not Have Discharged the Employee in the Absence of Union Activity.

Section 8(a)(3) of the National Labor Relations Act (Act) provides that it "shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."[2] The National Labor Relations Board (Board), pursuant to Section 10(b) of the Act is empowered to conduct hearings into charges of the commission of an unfair labor practice. These proceedings are "conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ." 29 U.S.C. § 160(b). Section 10(c) of the Act requires the Board to determine whether the employer has committed the alleged unfair labor practice based "upon the preponderance of the testimony taken. . .". An employee suspended or discharged

[2] National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3). The statute provides: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In recent years, unfair labor practices have constituted the great majority of cases received by the Board. In fiscal year 1980, 57,381 cases were received by the Board, 44,063 of which were unfair labor practices. 1980 NLRB Ann. Rep. 240 (Appendix). Similarly, in 1979, the Board received a total of 54,907 cases, of which 41,259 were unfair labor practices cases. 1979 NLRB Ann. Rep. 265 (Appendix).

for cause cannot be ordered reinstated, or granted any back pay by the Board under Section 10(c). 29 U.S.C. § 160(c).

"Dual motive" cases, as in the case at bar, arise under Section 8(a)(3) whenever an employer dismisses an employee for legitimate reasons as well as for union activity. *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084 (1980). The statute was intended to protect employees from retaliation for engaging in union activity but was not intended to interfere with the employer's "normal exercise" of selecting or discharging employees. H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1935); *e.g.*, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311-12 (1965), *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). In determining whether an employee has been discharged in violation of section 8(a)(3), the decisional body must weigh the interests of the employee against the interest of the employer in operating its business and arrive at the "true purpose" for the discharge. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 45-46. *See generally*, Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 20-24 (1947).

Historically, the Board and courts have differed on the proper causation standard to apply to Section 8(a)(3) actions which has led to the development and application of a number of causation tests. Under the "in part" test, an unlawful discharge arose whenever the General Counsel could prove that an employer was even partially motivated by union activity in discharging an employee. *Allen v. NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977); *Youngstown Osteopathic Hosp. Assoc.*, 224 N.L.R.B. 574, 575 (1976), 3 NLRB Ann. Rep. 65 (1938).

Retreating from the "in part" test and the absolute liability it imposed upon employers once the General Counsel presented any evidence of anti-union animus, the First Circuit Court

of Appeals fashioned the "dominant motive" standard for dual motive cases. *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring). Under this standard, the General Counsel had the burden of proving that the employer's primary or "dominant motive" in dismissing an employee was based upon anti-union sentiment. *See NLRB v. South Shore Hospital*, 571 F.2d 677, 684-85 (1st Cir. 1978); *NLRB v. Fibers International Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971); *see also Midwest Regional Joint Board v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977); *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968).[3]

In addition to the "in part" and "dominant motive" tests, other hybrid standards of proof emerged. *Waterbury Community Antenna, Inc. v. NLRB*, 587 F.2d 90, 98 (2d Cir. 1978) (board must prove that permissible ground would not have led to discharge); *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978) (employer violates Act if anti-union animus constituted "real motive" behind discharge). These various tests ultimately led to the present non-uniformity and disagreement among the several federal courts as to which party bears the burden of proof and the proper quantum of proof necessary to impose liability in dual motive cases. *See Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084-1086 (1980) (tracing development of various tests).[4]

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[3] For a discussion of the "dominant motive" test with an emphasis on its development within the First Circuit, see Du Ross, *Toward Rationality In Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA*, 66 Geo. L.J. 1108 *passim* (1978).

[4] The causation standard used in dual motive causes may be distinguished from the "pretext" cases. A pretext case arises when the employer's purported reasons for the discharge did not exist or were not relied upon. *TRW, Inc. v. NLRB*, 654 F.2d 307, 311 (5th Cir. 1981); *see Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084 (1980).

In recent years, the Board and the courts have formulated a "but for" or "same-decision" standard of causation for dual motive cases. Under this standard, a violation of the statute occurs only if the employee would not have been discharged "but for" the union activity. *E.g., NLRB v. Eastern Smelting and Refining Corp.*, 598 F.2d 666, 669-671 (1st Cir. 1979); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292, 1293, 1294 (1st Cir. 1977); *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1087 (1980). In an attempt to "alleviate the intolerable confusion in the 8(a)(3) area," the Board adopted the "but for" causation test in its *Wright Line* decision. *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980). The Board's test has both substantive and procedural components: 1) "General Counsel [must] make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision . . . 2) [T]he burden will [then] shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 N.L.R.B. at 1089.

The substantive "but for" test satisfies this Court's requirement that the Board determine the "true purpose" or "real motive" in hiring or firing. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). While many courts, including the First Circuit, favor the substantive "but for" test, the instant controversy focuses upon the proper allocation of burdens of proof between the employer and General Counsel in imposing this standard. In reviewing the Board's *Wright Line* test, the First Circuit Court of Appeals made clear that although it agreed with the adoption of a "but for" test it disagreed with the Board's allocation of the burdens of proof. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 903-04 (1981), *cert.*

denied, 455 U.S. 989 (1982).[5] The court found that the Board's test impermissibly shifted to the employer the burden of proving, by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct. *Id.* at 904. The court held, rather, that:

> . . . once the general counsel has established a basis for finding an improper motive, the employer must merely 'come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation.'

Id. at 904, *quoting NLRB v. Amber Delivery Service*, 651 F.2d 57, 69 (1st Cir. 1981); *NLRB v. Cable Vision*, 660 F.2d 1, 8 (1st Cir. 1981).

In the decision below, the Board found that the employer violated Section 8(a)(3) because it failed to meet its burden of "*overcoming* the General Counsel's *prima facie* case by establishing competent evidence that Santillo would have been discharged even absent his union activities." *NLRB v. Transportation Management Corp.*, 674 F.2d 130, 131 (1st Cir. 1982). The First Circuit rejected this effort by the Board to impose a greater burden than that of "neutralizing" General Counsel's case as being outside the Board's authority and inconsistent with the Act. *Id.* It remanded the case to the Board for reconsideration consistent with its prior decision. *Id.* at 131-32. It is precisely this procedural burden-shifting component of the Board's *Wright Line* test that has created

[5] The First Circuit in comparing the "but for" test of *Wright Line* with the previous practice of the Board to use an "in part" test commented: "We start by observing that the Board's new rule seems better than its old one." *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 902. *See generally* 16 Suffolk U. L. Rev., 226, *passim* (1982) (reviewing impact of *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981)).

confusion among the courts and the Board.[6] The Board's continued misallocation of the burden of proof in dual motive cases leaves employers and the Board alike without a clear formulation of their respective burdens.

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[6] The Second Circuit Court of Appeals has not yet commented upon the burden shifting analysis of the Board's *Wright Line* case. *NLRB v. Charles Batchelder Company*, 646 F.2d 33, 38-39 (2d Cir. 1981).

The Third Circuit recently rejected the Board's *Wright Line* test and held that only a burden of production shifts to the employer once Board asserts its initial case, *Behring International, Inc. v. NLRB*, 675 F.2d 83, 89 (3d Cir. 1982); *see also NLRB v. Blackstone, Inc.*, 685 F.2d 102, 105, 106 (3d Cir. 1982).

The Fourth Circuit has not yet indicated whether the Board's *Wright Line* test is an appropriate one. Instead, it utilizes a test more in line with the First and Third Circuits, requiring that the Board show an "affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." *NLRB v. Burns Motor Freight Line, Inc.*, 635 F.2d 312, 314 (4th Cir. 1981) *citing NLRB v. Patrick Dodge, Inc.*, 522 F.2d 804, 807 (4th Cir. 1975), *quoting NLRB v. Billen Shoe Company*, 397 F.2d 801, 803 (1st Cir. 1968); *see also Jeffrey Mfg. Division v. NLRB*, 654 F.2d 944, 948 (4th Cir. 1981).

It is unclear whether the Fifth Circuit has adopted the burden-shifting analysis of the *Wright Line* case. In *NLRB v. Robin American Corp.*, 654 F.2d 1022 (5th Cir. 1981) the court stated that once general counsel has established a dual motive case, the burden shifts to the employer to demonstrate that the same action would have been taken in the absence of protected conduct. 654 F.2d at 1025. The court, however, did not outline whether an affirmative burden of persuasion shifts to the employer. In contrast, the Fifth Circuit in *TRW, Inc. v. NLRB*, decided one week before the *Robin* case, held that the burden remains on the general counsel to find an "affirmative and persuasive reason why the employer rejected good cause and chose an illegal one," thus inferring that a burden of persuasion does not shift to the employer. 654 F.2d 307, 310 (5th Cir. 1981). More recently, the Fifth Circuit indicated that it has approved of the Board's *Wright Line* test. *Red Ball Motor Freight, Inc. v. NLRB*, 660 F.2d 626, 627-28 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2282 (1982). The *Red Ball* court, however, did not specifically address the burden-shifting analysis of the Board.

The Sixth Circuit has held that the employer has the burden of persuasion in proving that the discharge would have taken place in

A. The Court of Appeals' allocation of burdens of proof fully effectuates the policy and purposes of the Act as construed by this Court.

In *NLRB v. Wright Line*, the First Circuit Court established a three-part standard of proof for section 8(a)(3)

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the absence of the protected activity. *Republic Die and Tool Company v. NLRB*, 680 F.2d 463, 464, 465 (6th Cir. 1982). The Sixth Circuit has also cited the Board's *Wright Line* test with approval. *Borel Restaurant Corp. v. NLRB*, 676 F.2d 190, 193 (6th Cir. 1982); *Charge Card Association v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981); *NLRB v. Lloyd A. Fry Roofing Company*, 651 F.2d 442, 446 (6th Cir. 1981).

In *Peavey Company v. NLRB*, 648 F.2d 460 (7th Cir. 1981), the Seventh Circuit chose to follow the Board's *Wright Line* case. Like other courts, however, the burden-shifting analysis was not explained. *See also NLRB v. Berger Transfer and Storage Co.*, 678 F.2d 679, 691-92 (7th Cir. 1982).

The Eighth Circuit approved the burden shifting test of the Board in *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 560 (8th Cir. 1982) and in *NLRB v. Fixtures Manufacturing Corp.*, 669 F.2d 547, 550-51 n.4 (8th Cir. 1982).

The Ninth Circuit has approved the Board's *Wright Line*'s procedural shift, but like other circuits, the court has not discussed the general counsel's statutory burden of proof. *See NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 909 (1981); *see also Doug Hartley, Inc. v. NLRB*, 669 F.2d 579 (9th Cir. 1982).

In *NLRB v. Carbonex Coal Company*, the Tenth Circuit recently stated: "whether *Wright Line* cleared up a gray area, or, on the contrary, compounded the entire problem, is debatable." 679 F.2d 200, 203 (10th Cir. 1982). The Tenth Circuit is undecided on the issue of allocating the burdens of proof.

In a recent Eleventh Circuit case, the court declined to comment on the propriety of the *Wright Line* burden shifting test because the record presented was insufficient to support a charge under Section 8(a)(3). *See Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 n.4 (11th Cir. 1982). Nevertheless, the court stated: "Regardless of who has the burden of going forward with evidence, the General Counsel must prove by substantial evidence on the record as a whole that union animus actuated the plant closing." *Id.*

To date, the D.C. Circuit has not commented on the applicability of the Board *Wright Line* test to dual motive cases. The current standard of the court is in accord with the First and Third Circuits:

violations: 1) The General Counsel must first make a *prima facie* showing sufficient to support the *inference* that [the employer's opposition to] protected conduct was a motivating factor in the employer's discharge decision; 2) The burden of production then shifts to the employer to come forward with credible evidence to rebut or meet the general counsel's *prima facie* case; 3) Assuming the employer meets its burden of production, General Counsel carries the burden of persuasion in proving the existence of an unfair labor practice. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 903, 905 n.9.[7]

Although the Court of Appeals adopted the Board's "but for" test in dual motive cases, it rejected the Board's attempt to place upon the employer the burden of persuading the trier of fact that it would have taken the same action notwithstanding the protected activity. *Id.* at 905. As the court stated: "Let there be no mistake here . . . The burden of persuasion on all issues of disputed fact rests at all times with the general counsel." *Id.* at 905 n.9.

The test adopted by the Court of Appeals fully effectuates the purpose of the Act. The Act provides a remedy only to an employee suffering adverse employment consequences because of union activities. *Radio Officers' v. NLRB*, 347 U.S. 17, 42-43 (1954). The Act does not empower the Board to

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The general counsel's responsibility is not simply to present some evidence of improper motive but to find an "affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one." *Clothing Workers Mid-West Regional Joint Board v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977). The D.C. Circuit's standard therefore, would not warrant shifting the burden of persuasion onto the employer and presumably is at odds with the Board's *Wright Line* test.

[7] The Board itself adopted the first component of this test in its own *Wright Line* decision, 251 N.L.R.B. at 1089. In Petitioner's brief, however, the Board appears to have changed its proof standard by requiring that the General Counsel first prove "by a preponderance of the evidence that the employee's conduct was *in fact* a motivating factor in the employer's disciplinary decision" (Pet. Brief 30).

dispense its own brand of industrial justice; rather, the Board is authorized to act only where an employee has suffered job loss due to participation in union activity. *NLRB v. Fansteel Corp.*, 306 U.S. 240, 253-56 (1939). In the words of the Court, the Board cannot "interfere with the normal right of the employer to select its employees or to discharge them . . ." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

The Court of Appeals properly recognized that the imposition of an affirmative burden of persuasion on the employer would unduly interfere with lawful management prerogatives. Under the Board's test, rejected by the First Circuit, the General Counsel may establish a right to relief merely by showing the employee's participation in protected activities. To the extent that the Board thus imposes a heavy burden on a respondent, merely by establishing a *prima facie* case of discrimination, the Board's test represents an undue interference with management prerogatives. *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (*prima facie* case in Title VII action not "onerous"). The Court of Appeals' test, on the other hand, properly balances the interests of employee and employer as compelled by the language, legislative history, and policies of the Act. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963). In acknowledging the presumed legitimacy of Respondent's justification for its action and imposing upon the General Counsel the burden of establishing that the employer's reason was not the dispositive reason for the discharge, the Court of Appeals' test assures that only in those cases where the proof undercuts the legitimacy of Respondent's justification will relief be awarded. Thus, the Court of Appeals' test promotes the policies of the Act while simultaneously respects lawful employer objectives. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311-12 (1965).

Indeed, even the position taken by the Petitioner implicitly acknowledges the error of the Board's ways in *Wright Line*. Rather than relying upon the allocation of burdens of proof stated by the Board in that decision, Petitioner now suggests that the thrust of *Wright Line* is for the General Counsel to "prove by a preponderance of the evidence that the employee's protected activity was *in fact* a motivating factor in the employer's disciplinary decision" (Pet. Brief 30). Not only does this statement of the "test" fail to fully set forth the Board's *Wright Line* test, it points up the correctness of the Court of Appeals decision. In stating that General Counsel must prove protected activity was "in fact" a motivating factor, the Board merely restates the language of Section 10(c). The difficulty, however, lies in isolating the "in fact" reason, a task left wholly unaided by Petitioner's position. Rather, as recognized by the Court of Appeals, the imposition of a burden of production on the employer to nullify the presumptive effect of the General Counsel's *prima facie* case, serves most precisely to identify the factual dispute. Only *after* such a factual dispute has been fully identified can the General Counsel meet its burden of proof. The Board's *Wright Line* test ignores the need to identify the crucial fact issues and leaves the trier of fact unaided in that it fails to adequately specify the precise and appropriate *means* for identifying the factual dispute. It is this shortcoming and the concomitant disregard for the employer's legitimate interests that attests to the correctness of the Court of Appeals' decision.

Virtually conclusive support for the Court of Appeals rationale is found in the analogous decision of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a sex discrimination action brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000*e et seq.* In that case, this Court established a three-part causation test to establish a case of employment discrimination: first, the plaintiff

establishes a *prima facie* case of discrimination;[8] the employer must then come forward with a legitimate nondiscriminatory reason for its employment decision; following which the plaintiff must show that the "proffered reason was not the true reason for the employment decision." 450 U.S. at 252, 253, 256; *accord Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978) (employer need only explain what he has done); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577, 578 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). At all times the plaintiff retains the burden of persuasion and only a burden of production to rebut the presumption of discrimination devolves upon the employer. *Id.* at 254, 256; *accord Ford Motor Company v. E.E.O.C.*, 102 S. Ct. 3057, 3061 n.7 (1982).

As noted by this Court in *Albemarle Paper v. Moody*, 422 U.S. 405 (1975), the policies and purposes of Title VII are analogous to the Act in that Title VII is not designed or intended to interfere with the exercise of normal employer functions while at the same time it assures that those who have been the victims of unlawful discrimination receive relief. *Id.* at 419-20; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 803, 804; *NLRB v. Fansteel Corp.*, 306 U.S. 240, 255 (1939). In the court's *Wright Line* decision, the First Circuit adopted a test virtually identical to that of the *Burdine* Court, correctly recognizing the similar policies underlying both Title VII and the Act. As the Third Circuit recognized in adopting the First Circuit standard of proof for dual motive cases under Section 8(a)(3):

> "[t]he Supreme Court recognized the problems of proof in the *Burdine* line of cases, but concluded that

[8] To establish a *prima facie* case under Title VII, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

> only the burden of production, and not persuasion, shifts to the defendant. Since the same considerations are present where the discrimination is based on union activity, the Board should follow the *Burdine* procedure in those cases as well."

Behring International, Inc. v. NLRB, 675 F.2d 83, 89 (3d Cir. 1982).

The Petitioner relies heavily on *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977) in support of its position that a burden of persuasion shifts to the employer in Section 8(a)(3) cases. In *Mt. Healthy*, in which an employee alleged that his discharge violated constitutionally protected rights, the Court required that an employee establish a *prima facie* case of discrimination by proving that protected conduct constituted a "motivating factor" in the discharge. Subsequently, the Court declared that the employer bears the burden of persuasion to prove that the dismissal would have occurred even in the absence of the protected activity. 429 U.S. at 285. Although the Court imposed a burden of persuasion upon the employer, the facts of that case are distinguishable from the case at bar. In *Mt. Healthy*, the school board employer admittedly discharged the employee for activity protected by the first amendment, but contended that the reinstatement remedy was inappropriate because of other unprotected conduct engaged in by the employee. *Id.* at 283, 284.[9] Because the employer violated the employee's constitutionally protected rights, the Court shifted the burden to the school board to show by a preponderance of the evidence that it "would have reached the same decision as to respondent's employment even in the absence of the protected conduct."

[9] The school board was expressly concerned with the teacher's "notable lack of tact in handling professional matters," for making "obscene gestures" to discipline students, and for distributing an administrative memorandum on the school dress code to a local radio station. 429 U.S. at 282, 283 & n.1.

Id. at 287. In other words, the burden imposed upon the employer became an affirmative defense.

In contrast, Respondent in this case has not conceded that Santillo was discharged for union activities. Rather, the threshold issue remains whether anti-union animus actually motivated the Respondent's decision to discharge Santillo. Distinguishing *Mt. Healthy* from dual motive cases, the First Circuit Court of Appeals noted:

> [t]he employer's claim [in *Mt. Healthy*] was thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance. By contrast, in the typical labor case, the employer vigorously disputes the determining reason for the discharge. These cases . . . do not involve true affirmative defenses going to the appropriateness of the remedy . . ."

662 F.2d at 906.

Furthermore, the *Mt. Healthy* Court balanced competing interests in a constitutional setting whereas here Congress has enacted a statute which balances the competing interests of employer and employee. *Cf. Washington v. Davis*, 426 U.S. 229, 239 (1976) (constitutional standard for adjudicating equal protection not identical to standards applicable under Title VII).

Petitioner's reliance on *NLRB v. Great Dane Trailers, Inc*, 388 U.S. 26 (1967) is also misplaced. (Pet. Brief 36 n.24). To the contrary, *Great Dane* strongly supports the correctness of the result reached by the Court of Appeals. In that case, respondent company allegedly discriminated against a class of employees in refusing to pay vacation benefits to striking workers. 388 U.S. at 30. The Court held that once General Counsel proves that the employer engaged in discriminatory activity, the employer must "come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.* at 34. Not only does *Great Dane* fail to sanction the imposition of an affirmative burden of persuasion on the

employer to rebut the General Counsel's *prima facie* case, if anything, the language used by the Court ("come forward with the evidence") is suggestive of a burden of production. *See* McCormick on Evidence, § 338 at 791-92 (Cleary ed. 1972).

Since the standard of proof articulated in *Mt. Healthy*, notwithstanding *Great Dane*, is inapplicable to Section 8(a)(3) cases, we are left with a burden of proof formulation which parallels the *Burdine* standard. The proper allocation of the burden of proof in dual motive cases, therefore, requires that General Counsel establish a *prima facie* showing that the motivating factor for the discharge of the employee was protected activity. The employer must then produce evidence of a legitimate reason(s) for the discharge. General Counsel carries the burden of persuasion to show, by a preponderance of the evidence that the employee would not have been discharged in the absence of protected activity. This test is consistent with the Act. Moreover, it will foster discovery of the "true purpose" of the discharge as well as the motive of the employer. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961).[10]

Finally, the proposed formulation satisfies the teachings of *Jones & Laughlin*; that the Act was not intended to interfere with the normal right of an employer to select or discharge employees for cause. 301 U.S. 1, 45-46.

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[10] At no time was General Counsel without the opportunity to prove that Respondent's alleged conduct was unlawful. The liberal rules of discovery applicable to any civil suit were available to the General Counsel and the Board. 28 U.S.C., Fed. R. Civ. P., Rules 26-37.

B. The Court of Appeals properly construed the Act and properly applied the rules of evidence in determining that the burden of persuasion remains with the General Counsel for the duration of a Section 8(a)(3) action.

The Act supports the Court of Appeals' *Wright Line* decision that the burden of persuasion never shifts to the employer in a Section 8(a)(3) dual motive action.

Section 10(b) of the Act as amended in 1947 provides that "so far as practicable" the rules of evidence applicable in the district courts of the United States shall apply to Board proceedings. 29 U.S.C. § 160(b).[11] The amendment added the last sentence to section 10(b), directing observance of the rules of evidence applicable in the district courts and substituting this provision for one that had read "in any such proceeding the rules of evidence prevailing in the courts of law or equity shall *not* be controlling" (emphasis added). Ch. 372, § 10(b), 49 Stat. 449 (1935). The Congressional purpose behind the amendment was to prevent the indiscriminate use of "expert" evidence in Board proceedings and to permit more effective judicial review of Board orders. H.R. Conf. Rep. No. 510, on H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB Legislative History of the Labor Relations Management Act, 1947, 534-36 (1948); H. R. Rep. 245, on H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Relations Management Act, 1947, 292, 331-32 (1948); *see Pittsburgh S. S. Co. v. NLRB*, 180 F.2d 731,

[11] The language "so far as practicable" does not dilute the force of the statute. These words are only intended to authorize the Board to depart from rules of evidence to the extent necessary due to the peculiar characteristics of administrative hearings. *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 374 (9th Cir. 1965).

734 (6th Cir. 1950) *aff'd*, 340 U.S. 498 (1951).[12]

As a consequence of Section 10(b), as amended, the Federal Rules of Evidence are applicable to Board proceedings. Fed. R. Evid. 1101. Moreover, both Board and court decisions construing Section 10(b) have generally held that the Federal Rules of Evidence apply to the trial examiners as well as Board proceedings. *E.g., NLRB v. International Union of Operating Engineers*, 413 F.2d 705, 707 (9th Cir. 1969); *NLRB v. Amalgamated Meat Cutters & Butchers Workmen*, 202 F.2d 671, 673 (9th Cir. 1953); *Sears Roebuck & Company*, 224 N.L.R.B. 558, 559 (1976).

Since the Federal Rules of Evidence bind the Board, Rule 301, which governs the allocation of burdens of proof, controls the standard of proof applicable in dual motive discharge actions under Section 8(a)(3).[13] Rule 301 codifies the

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[12] In the House report on H.R. 3020, Chairman Hartley indicated that Section 10(b) prior to the proposed amendment "resulted in what courts have described as 'shocking injustices' in the Board's rulings, 'assinine reasoning by the Board', 'findings overwhelmingly opposed by the evidence,' findings that 'strain our credibility' and 'remarkable discrimination' on the part of the Board in believing its own witnesses and in disbelieving others." (citations omitted). H.R. Rep. 245, on H.R. 3020, 80th Cong., 1st Sess. (1947) *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, 292, 332 (1948).

[13] Rule 301 provides: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Pub. L. No. 93-595, 88 Stat. 1926 (1975), (codified at 28 U.S.C., Fed. R. Evid. 301). Under the so-called "bursting bubble theory," the presumption of unlawful discrimination should disappear when the employer introduces evidence that it discharged the employee for cause. Fed. R. Evid. 301, Advisory Note. Rule 301 codifies traditional evidentiary theory. Although the concept of burden of proof

traditional principle of proof that the party against whom a presumption is imposed has the burden of going forward with enough evidence to rebut the presumption. 28 U.S.C., Rule 301. The burden of persuasion rests with the plaintiff or charging party. J. Wigmore, Evidence, § 2487 at 282 (3d ed. 1940), *quoting Speas v. Merchants' Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924). Applying Rule 301 to Section 8(a)(3), the General Counsel must first establish a *prima facie* case of unlawful discrimination to have a presumption of unlawful conduct operate in its favor. The burden of production then shifts to the employer to show that the employee was terminated for cause. If the employer meets its burden of production, the burden of persuasion remains on the General Counsel to prove that the employee would not have been discharged in the absence of protected activity. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 905 & n.9. Consistent with the legislative history of Section 10(b) and the subsequent adoption of Rule 301, this Court should reject the Board's *Wright Line* test which impermissibly shifts a burden of *persuasion* onto the employer once General Counsel has established a *prima facie* case.

The Administrative Procedures Act (A.P.A.), 5 U.S.C. § 550, *et seq.* is also applicable to Board proceedings. *NLRB v. Amalgamated Meat Cutters and Butchers Workmen*, 202 F.2d 671, 673 (9th Cir. 1953); *Pittsburgh S. S. Co. v. NLRB*, 180 F.2d 731, 732-36 (6th Cir.) *aff'd*, 340 U.S. 498 (1950). Section 7(c) of the A.P.A. provides that the "proponent of a rule has the burden of proof." 5 U.S.C. § 556(d). Since the Board is an

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is a basic principle of law, Professor Wigmore aptly noted that the difficulties in determining who bears the burden of proof and significance of the burdens "arise not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered." 9 J. Wigmore, Evidence § 2485, at 283 (Chadbourne Rev. 1981).

agency bound by the A.P.A., the General Counsel, as the proponent, should bear the burden of persuasion in Section 8(a)(3) actions. It thus follows that the Board's imposition of a burden of persuasion onto the employer violates the A.P.A. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 903.[14]

Section 10(c) of the Act as amended in 1947 governs reinstatement for violations occurring under Section 8, providing that the Board may order reinstatement of an employee with back pay if it finds upon a "preponderance of the testimony" that the employer violated Section 8(a)(3). 29 U.S.C. 160(c). The amendment substituted a "preponderance of the testimony" standard in lieu of the 1935 language which had required that the Board weigh "all the testimony." National Labor Relations (Wagner) Act, ch. 372, § 10(c), 49 Stat. 449 (1935) *reprinted in* 2 NLRB, Legislative History of The National Labor Relations Act, 1935, at 3275 (1949).

The Petitioner strongly relies on a Senate Conference Committee Report on the 1947 amendments to section 10(c) to support its proposition that Congress intended the employer to bear the burden of persuasion in disproving alleged unfair labor practice actions (Pet. Brief 21-22). In that report, Senators Taft and Pepper debated on the proper burden of proof the employer carries to avoid reinstatement under section 10(c). 93 Cong. Rec. 6518-19 (1947). Their debate, however, was limited to a discussion of reinstatement once a violation is proven, and was silent on the actual *allocation* of burdens of proof between the employer and General Counsel in proving a Section 8(a)(3) violation. A close examination of the conference report reveals that Congress made no reference to the issue of whether a burden of persuasion or production devolves upon an employer in rebutting a *prima facie*

[14] The Board's own regulations even provide that "[t]he Board's attorney has the burden of proof of violations of section 8." 29 C.F.R. 101.10(b).

case of unlawful discrimination. *See Zurn Industries, Inc. v. NLRB*, 680 F.2d 683, 693 (9th Cir. 1982); *Behring International, Inc. v. NLRB*, 675 F.2d 83, 90 n.6 (3d Cir. 1982); *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 904 n.8 (1st Cir. 1981).[15] The contention of the Board,

[15] The pertinent debate between Senators Taft and Pepper was as follows:

MR. PEPPER: Mr. President, turning to page 34 of the conference committee print, the conference has added the following language to the Senate bill:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

That looks like a very simple and innocent provision. It may seem on its face to be a very proper provision, for it appears only to give the employer the right to discharge a worker for good reason. But this is what the provision does: Under the present law a worker may be discharged by his employer for cause, but the Board may go into the real reasons for the discharge, and if the Board finds that although cause was given as the excuse, the real reason was the fact that the worker was trying to organize a union or trying to join a union, the Board may set aside the act of the employer and require the reinstatement of the worker upon that evidence. But this language allows a worker to be discharged because of union activities, although that may be only a concurrent cause of discharge.

In other words, if an employer has been allowing workers to smoke in a prohibited area, if he has been allowing workers to show up late for work, if he has been letting them quit ahead of time at the end of the day, or violate any other rules, yet if a given employee, because he has been engaged in union activities which the employer does not like, is selected out of the crowd and discharged for violating a rule, and no one else is discharged for violating the rule, or if it can be shown that the real motivating reason which caused the employer to fire the worker was his union activities, if cause existed it would be a basis for discharge, and this provision would forbid the Board to reinstate the worker. As a practical matter, that is the effect of that language.

MR. TAFT: I think the Senator is completely mistaken. That is not all the effect of this language. It merely states the present rule. If a man is discharged for cause, he cannot be reinstated. *If he is discharged for union activity, he must be reinstated. In every case*

then, that "Congress specifically approved the allocation of burdens of proof reflected in the Board's standard . . ." (Pet. Brief 21-22) is wholly unsupported.

Concluding that the legislative history of Section 10(c) is ambiguous on the issue of burdens of proof, reference must

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it is a question of fact for the Board to determine.

The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is. If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome. *The Board must determine the facts in every case.* For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provision of law, after the modification which we forced in the House provision.

MR. TAFT: We said, "We will accept this language if you will eliminate the other." Naturally the House conferees wanted to show that some of the House language was preserved. In general they accepted the entire basis of the Senate bill and the Senate language. What we did here, in effect, was to say, "If you will modify the language so that it does not change the existing law, we will accept it, and you can point to it as one of the instances in which the House language instead of the Senate language was accepted."

MR. PEPPER: We have an admission from the Senator from Ohio that the language was intended to mean something. *It was intended to shift the burden of proof from the employer to the employee* . . . I wish to quote from the conference report, and I hope Senators will attend what I am about to quote. I suggest that the result of the conference report is to leave the interpretation of the language exactly as the House intended it. Let us see if that is correct. I read from page 55 of the conference report:

> (10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged

be made to the textual construction of the Act. C. Sands, 2A Sutherland Statutory Construction § 48.01, at 182 (4th ed. 1973). It is a well established principle of statutory construction that all parts of a statute should be construed together. *Id.* § 51.01, at 288. Here, Section 10(b) unambiguously

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for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

That shows that the Senate conferees agreed to the elimination of the words "weight of evidence," because they do not use those words which are necessary to accomplish the effect which the House sought to achieve. They say that under the rules of the Board itself the Board had to find by a preponderance of the evidence, and therefore there was not any need to put in the words of the House; but they do not disaffirm the purpose of the House, which the Senator from Ohio has acknowledged this afternoon.

MR. TAFT: The conference report does not quite say what the Senator from Florida suggests. The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. *The Board will have to determine—and it always has—whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question.* The mere fact that there may be a little cause or real reason would not in any way lead the Board to refuse to give the employee reinstatement and back pay.

provides that the rules of evidence apply to Board proceedings, and as previously discussed, Rule 301 of the Federal Rules of Evidence prevents shifting a burden of persuasion onto the employer. Although the legislative history of Section 10(c) may be inconclusive, 10(c) should be read together with Section 10(b).[16] In so doing, this Court should adopt the reasoning of the court below that any effort by the Board to impose upon the Respondent a greater burden than "neutralizing the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case" is outside the Board's statutory authority. 674 F.2d at 131.

C. Respondent satisfied its burden by producing evidence that Santillo was terminated for cause.

In light of the three-part burden of proof scheme enunciated by the Court of Appeals in its *Wright Line* decision,

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MR. PEPPER: I do not desire to prolong the argument, because I wish to conclude. I shall have to let the matter stand on the statement of the Senator from Ohio as to the intention of the House in its original bill, what I read from the report of the conferees, and the fact that the language to which I have alluded was put in the bill at all, which certainly was intended to have some effect. Here is the importance of it. It is always a difficult matter to determine the real reason of the employer in discharging a worker. There can always be found some sort of excuse if it is desired to find one. If the employer does not give the worker the benefit of the doubt he can always wait until he smokes a cigarette three feet before he gets out of the door, or find some error that would constitute cause. *The provision shifts the burden of proof to make the worker show he was discharged for union activities, rather than to make the employer show that the worker was discharged for cause.*

[16] Petitioner also infers that its construction of the Act has become part of the statute by reason of congressional acquiescence. This is not the rule, where as here, the Courts of Appeals are divided on the reading of the statute. *See NLRB v. Radio and Television Broadcast Engineers Union Local 1212*, 364 U.S. 573, 585 (1961). As Professor Sands aptly states: "[e]xperience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency." Sands, *supra* § 51.01, at 288.

Respondent in the instant case has met its burden of production. General Counsel established a motivating factor for the discharge by showing that Santillo had some contact with a labor union and that Respondent was aware of Santillo's involvement. Respondent then provided evidence that Santillo was discharged for misusing compensatory time and leaving keys in his vehicle (J.A. 59).

Consistent with the Court of Appeals' burden of proof formulation, General Counsel subsequently had the burden of proving that a violation of Section 8(a)(3) occurred. Here, however, General Counsel acted pursuant to the Board's *Wright Line* test and failed to establish persuasively by a preponderance of the testimony that Santillo would not have been discharged in the absence of his union activity. The Board's procedural test rejected the Respondent's legitimate and nondiscriminatory reasons for the discharge as neutralizing the General Counsel's *prima facie* case. Furthermore, the Board failed to find the "true reason" for the discharge. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256; *Local 357, Teamsters International v. NLRB*, 365 U.S. at 675.

Consistent with decisions of this Court and the purpose of the Act, the court below properly remanded the case to the Board for reconsideration under the standard enunciated by the First Circuit in *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, to determine whether Santillo would have been discharged in the absence of protected activity.

Conclusion.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the case remanded to that court for remand to the Board, with instructions to apply the burden of proof standard formulated in *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981).

Respectfully submitted,

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